

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**NOTICE OF PROPOSED AMENDMENTS TO
ORDER 113, IN THE MATTER OF DEATH PENALTY REPRESENTATION IN
THE FOURTH CIRCUIT,
AND
THE FOURTH CIRCUIT PLAN IN IMPLEMENTATION
OF THE CRIMINAL JUSTICE ACT**

PLEASE TAKE NOTICE that the Fourth Circuit Judicial Council intends to amend Order 113, In the Matter of Death Penalty Representation in the Fourth Circuit, as highlighted in the attached version of the Order and summarized below:

- Sections I and II, are modified by replacing 21 U.S.C.A. § 848 with 18 U.S.C.A. § 3599 throughout the two sections;
- Section II, Paragraph C, is modified to change the amount of time required of the district court to render a decision under 28 U.S.C.A. § 2266 from 180 days to 450 days or 60 days after the date on which the case is submitted for decision, whichever is earlier.

ADDITIONALLY, the Judicial Council intends to amend the Fourth Circuit Plan In Implementation of the Criminal Justice Act as highlighted in the attached version of the Plan and summarized below:

- Section I, Paragraph 2, is modified to change the code section to 18 U.S.C. § 3599(a)(2);
- Section VI, Paragraphs 2 and 3, are modified to replace specific CJA payment rates and limits with a statement that these amounts shall be as prescribed by law and authorized by the Judicial Conference.

The proposed amendments will take effect October 1, 2008, subject to revision in light of any comments received. Interested parties may submit comments on or before September 30, 2008, to:

Samuel W. Phillips
Circuit Executive
1100 East Main Street, Suite 617
Richmond, Virginia 23219

August 14, 2008

Date

/s/ Samuel W. Phillips

Circuit Executive

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JUDICIAL COUNCIL

In the Matter of Death Penalty Representation *

No. 113

In the Fourth Circuit *

ORDER

The Report of the Death Penalty Committee, which is attached to and made a part of this Order, is hereby adopted by the Fourth Circuit Judicial Council. The official policy of the Fourth Circuit shall be:

(1) Federal Public Defenders may be appointed to represent individuals charged with federal capital crimes and collateral attacks on federal capital convictions and sentences.

(2) Federal Public Defenders shall not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. Section 2254 for relief from a state death sentence.

(3) The limitations on time for decision set forth in 28 U.S.C.A. Section 2266 shall apply at the district and circuit court levels and the Circuit Executive is authorized to inquire into the reasons for any noncompliance with the limitations.

and it is so ORDERED.

FOR THE COUNCIL:

/s/ J. Harvie Wilkinson III

Chief Judge

Date: October 3, 1996

Amended:

DEATH PENALTY REPRESENTATION IN THE FOURTH CIRCUIT

I. STATUTORY PROVISIONS PRESENTLY APPLICABLE TO APPOINTMENT OF ATTORNEYS FOR CAPITAL REPRESENTATION

A. APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS IS STATUTORILY GUARANTEED FOR FEDERAL TRIALS, DIRECT APPEAL FROM FEDERAL CONVICTIONS, § 2255 PROCEEDINGS, AND § 2254 PROCEEDINGS.

Congress has enacted special provisions guaranteeing that "in every criminal action in which a defendant is charged with a crime which may be punishable by death" and in "any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation ... shall be entitled to the appointment of one or more attorneys." ~~21 U.S.C.A. § 848(q)(4) (West Supp. 1996)~~ **18 U.S.C.A. § 3599(a)(1) & (2)**. Any defendant indicted for a federal capital crime is entitled to have two attorneys appointed. 18 U.S.C.A. § 3005 (~~West Supp. 1996~~).

B. THE MINIMUM QUALIFICATIONS OF APPOINTED COUNSEL ARE STATUTORILY DEFINED.

The lead attorney appointed to represent one indicted on an offense punishable by death "must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court." ~~21 U.S.C.A. § 848(q)(5)~~ **18 U.S.C.A. § 3599(b)**. And, at least one of the attorneys appointed to represent a defendant indicted with a federal capital crime must "be learned in the law applicable to capital cases." 18 U.S.C.A. § 3005.

A lead attorney appointed after conviction to represent a capital defendant on direct appeal, or during § 2255 proceedings, "must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." ~~21 U.S.C.A. § 848(q)(6)~~ **18 U.S.C.A. § 3599(c)**.

A court may, for good cause shown, appoint another attorney who does not meet the requirements set forth in ~~§ 848(q)(5)-(6)~~ **18 U.S.C.A. § 3599(b)-(c)**, but whose experience otherwise enables him or her to adequately represent the defendant. ~~21 U.S.C.A. § 848(q)(7)~~ **18 U.S.C.A. § 3599(d)**.

Attorneys that have been appointed typically continue the representation on appeal. See ~~21 U.S.C.A. § 848(q)(8)~~ **18 U.S.C.A. § 3599(e)** (providing that once appointed attorneys continue representation throughout subsequent proceedings); 18 U.S.C.A. § 3006A(c) (~~West 1985~~).

Repealed February 27, 2018

C. COMPENSATION FOR FEES IS PRESENTLY LIMITED ONLY TO A "REASONABLE FEE" IN THE VIEW OF THE DISTRICT COURT.

Attorneys appointed pursuant to § 848(q)3599 may be compensated at the rate authorized by the Judicial Conference pursuant to ~~21 U.S.C.A. § 848(q)(10)(A) 3599(g)(1)~~. Counsel is also bound by the limitation of \$7,500 for investigative, expert, and other reasonably necessary expenses unless a higher fee is approved by the court. ~~21 U.S.C.A. § 848(q)(10)(B)18 U.S.C.A. § 3599(g)(2)~~.

II. RECOMMENDATIONS

A. SOLICIT QUALIFIED AND INTERESTED COUNSEL AND MAINTAIN LISTS OF ATTORNEYS QUALIFYING FOR APPOINTMENT AS LEAD COUNSEL AND SECOND-CHAIR COUNSEL.

District Court

**** It is recommended that a plan be adopted under which the district court would contact the bar and solicit applications for a panel of attorneys qualified to represent capital defendants.**

Some districts have experienced difficulty in locating qualified and interested counsel to undertake capital representation. But, it is believed that there are many attorneys who would seek the opportunity for appointment if they were made aware of that opportunity. Accordingly, it is recommended that on a district-by-district basis, a program of solicitation of the bar should be implemented in order to increase the number of attorneys seeking appointment.

**** It is recommended that the district courts maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel and that these attorneys' expertise in trial, appellate, and habeas representation be identified.**

Because the statutory requirements for lead counsel are more stringent than those for second-chair counsel, courts should maintain separate lists of those attorneys who are qualified for each type of appointment. In addition to the statutory qualifications, specialized skills and experience are necessary to represent capital defendants in trial, appellate, and habeas proceedings. Courts may find separate lists of attorneys with trial, appellate, and/or habeas experience useful. Alternatively, courts may conclude that some other method of identifying various types and levels of expertise is preferable.

In ascertaining which attorneys of those expressing an interest in capital representation and seeking appointment are qualified to be placed on lists of those available for appointment as lead and second-chair counsel, the court may wish to consider appointment of an oversight committee composed of district judges, magistrate judges, district court clerks, and the Federal Public Defender, see 18 U.S.C.A. § 3005.

It is envisioned that over time attorneys chosen for appointment from the second-chair counsel list will develop the qualifications to be placed on the lead counsel list, and that appointment

Repealed February 27, 2018

of second-chair attorneys is desirable in order to develop a wider range of expertise available for lead counsel appointment. In addition, special consideration should be given to appointment of the attorney who represented a § 2254 petitioner during state collateral proceedings, if interested in appointment and qualified for it. See ~~21 U.S.C.A. § 848(q)(7)~~ 18 U.S.C.A. § 3599(d).

Circuit Court

**** It is recommended that the circuit court solicit the bar for applications, maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel, and identify attorneys' expertise in appellate and habeas representation.**

Although attorneys that have been appointed at the district court level typically continue their representation on appeal, from time to time it is necessary to appoint attorneys pursuant to § ~~848(q)~~ 3599 during appellate proceedings. Consequently, it is recommended that a plan to solicit the bar for applications for appointment to capital representation be adopted and that lists of those attorneys qualified and interested in capital representation as lead and second-chair counsel be maintained.

B. USE FEDERAL PUBLIC DEFENDERS FOR REPRESENTATION OF FEDERAL CAPITAL CHARGES AND COLLATERAL ATTACKS ON FEDERAL CAPITAL CONVICTIONS AND SENTENCES; DO NOT UTILIZE FEDERAL PUBLIC DEFENDERS FOR PROSECUTION OF HABEAS PROCEEDINGS FILED BY STATE PRISONERS.

**** It is recommended that Federal Public Defenders be utilized for representation of individuals charged with federal capital crimes and collateral attacks on federal capital convictions.**

Providing representation for defendants charged with federal crimes punishable by the death penalty is within the statutory responsibility of the Federal Public Defender (FPD) to provide representation for all indigents charged with federal crimes. It is contemplated that FPDs will be placed in the pool of attorneys available to represent capital defendants in federal capital trials, on direct appeal, and in § 2255 proceedings. For some period of time, until FPDs develop the qualifications and experience, their appointments may be limited to second-chair positions. See ~~21 U.S.C.A. § 848(q)(7)~~ 18 U.S.C.A. § 3599(d). However, such appointments should be encouraged whenever possible in order to permit FPDs to attain expertise in this area.

**** It is recommended that FPDs not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. § 2254 for relief from a state death sentence.**

The consensus of opinion among FPDs in the circuit is that FPD representation in § 2254 proceedings challenging a state sentence of death is undesirable for a number of reasons. First, the prospect of a federal agency opposing the validity of state convictions creates the appearance of an unacceptable conflict between separate and independent sovereigns. Second, although the FPD is authorized to represent defendants seeking a writ of habeas corpus, encouraging such representation is problematic because litigation of collateral state-court proceedings and issues

Repealed February 27, 2018

may be necessary, raising the question of the appropriateness of FPDs appearing in state court and presenting issues outside their traditional area of expertise. Finally, appointing FPDs to represent § 2254 petitioners could be viewed as an attempt to circumvent the will of Congress, given its recent decision to withdraw funding from death penalty resource centers.

C. IMPOSE RESTRAINTS ON TIME FOR DECISION.

**** It is recommended that the limitations on time for decision set forth in 28 U.S.C.A. § 2266 be adopted at the district and circuit court levels and that the Circuit Executive be authorized to inquire into the reasons for any noncompliance with the limitations.**

Under 28 U.S.C.A. § 2266 (enacted by the Antiterrorism and Effective Death Penalty Act of 1996), proceedings brought pursuant to § 2254 that are governed by Chapter 154 of Title 28 and proceedings brought pursuant to § 2255 in which the defendant was sentenced to death must be decided by the district court and the circuit court within specified time limits. The district court is required to render a decision and enter a final judgment (including a resolution of any motion to alter or amend the judgment) within ~~180~~ **450** days of the date on which the petition is filed **or 60 days after the date on which the case is submitted for decision, whichever is earlier**, subject to an extension of up to 30 days if the district court determines that the ends of justice would best be served by the delay. See 28 U.S.C.A. § 2266(a)-(b). The court of appeals is required to render a decision within 120 days of the date on which the reply brief is filed and to rule on any petition for rehearing or ~~suggestion for~~ rehearing en banc within 30 days of the date the petition/~~suggestion~~ is filed or the date a response thereto is filed, whichever is later. See 28 U.S.C.A. § 2266(c). Furthermore, if the petition/~~suggestion~~ is granted, any hearing must be conducted and a final decision rendered within 120 days of the entry of the order granting rehearing. Id. And, following a remand by the court of appeals en banc or the Supreme Court for further proceedings, the period for decision runs from the date the remand is ordered. Id.

The time limitations imposed by § 2266 are applicable only in those § 2254 proceedings governed by Chapter 154, (i.e., those challenging a state death sentence where the state has adopted specified procedures for appointment of counsel to represent the defendant in state post-conviction proceedings) and in § 2255 proceedings in which the defendant was sentenced to death. As such, the limitations presently will not apply to the majority of § 2254 petitions challenging a death sentence because of the relatively recent adoption of those mechanisms. See Bennett v. Angelone, No. 95-4004, 1996 WL 469705, at *4 (4th Cir. Aug. 20, 1996) (stating that question of whether Virginia's mechanism for appointment of counsel satisfied requirements for application of Chapter 154 was irrelevant because Chapter 154 would not apply when the mechanism was not in place during the petitioner's state collateral proceedings). Time constraints, however, are sorely needed at present. See, e.g., Correll v. Thompson, 63 F.3d 1279, 1285 n.4 (4th Cir. 1995), cert. denied, 116 S. Ct. 688 (1996) (noting that § 2254 petition was pending in district court for in excess of three years prior to final decision). Consequently, it is recommended that the time limitations for decision imposed by § 2266 be adopted and implemented by rule immediately. It is contemplated that the limitations would apply to cases pending when the rule became effective, but that the limitations would apply prospectively. (For example, an appeal in a § 2255 proceeding challenging a death sentence that had been argued to this court and was pending decision would have to be decided within 120 days of the date the rule becomes effective.)

Repealed February 27, 2018

Additionally, it is recommended that a mechanism be established to track cases to which the time limitations apply, and in the event that cases remain pending after the date on which they were due to be decided, the Circuit Executive be authorized to make appropriate inquiry on behalf of the Judicial Council to seek an explanation of the reasons why the judge or panel of judges failed to comply with the time limitation.

Repealed February 27, 2018

PLAN OF THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In Implementation of

The Criminal Justice Act

The Judicial Council of the Fourth Circuit adopts the following plan, in implementation of the Criminal Justice Act.

I. RIGHT TO COUNSEL

1. Direct Appeals: In every direct appeal involving a person

- (a) who is charged with a felony or misdemeanor (other than a petty offense), or with juvenile delinquency as defined in 18 U.S.C. § 5031, or with a violation of probation or supervised release; or who faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release; or who is under arrest and representation is required by law; or who is subject to a mental condition hearing under Chapter 13 of Title 18; or who is held in custody as a material witness; or who appeals from parole proceedings conducted pursuant to 18 U.S.C. § 4106A; or,
- (b) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces the loss of liberty, any federal law requires the appointment of counsel,

whether the appeal be by a defendant from a judgment of conviction or other order, or by the United States from a judgment of acquittal or dismissal, a defendant shall be entitled to be represented by counsel as a matter of right.

If the appeal involves a petty offense for which confinement is authorized, the court may appoint counsel for a financially eligible person upon a determination that the interests of justice so require.

In these cases, unless an application for the appointment of counsel has already been received, or notice of appearance has been filed by retained counsel, the clerk of this court shall promptly notify the defendant of his right to counsel and shall inform him that counsel will be appointed if he is financially unable to obtain adequate representation. Where an attorney had previously been appointed to represent the defendant in district court, that attorney shall be reappointed, without prior notice, upon the docketing of the appeal in this court. If there is no such reappointment, either because defendant appeared pro se or was represented by retained counsel in the district court, the clerk shall appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

In pro se cases in which the appellant exercises his right to represent himself as suggested by Faretta v. California, 422 U.S. 806 (1975); 28 U.S.C. § 1654, the court may find it

Repealed February 27, 2018

appropriate to appoint standby counsel for the appellant to assist in the appeal to protect the integrity and ensure the continuity of the judicial proceedings. (McKaskle v. Wiggins, 465 U.S. 168 (1984); Faretta, supra). Accordingly, if a pro se appellant is represented, at least in part, by standby counsel, compensation may be provided under the CJA.

2. Collateral Proceedings: In an appeal in a post-conviction proceeding under 28 U.S.C. §§ 2254 or 2255, seeking to vacate or set aside a death sentence, a petitioner who is financially unable to obtain adequate representation shall be entitled to appointment of one or more attorneys. ~~21 U.S.C. § 848(q)(4)~~ **18 U.S.C. § 3599(a)(2)**. In an appeal in a collateral proceeding brought by the petitioner from any other order denying the relief requested pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, a petitioner shall not be entitled to be represented by counsel as a matter of right. In these cases, counsel will be appointed only after the court has decided to hear the case on the merits, as in the granting of leave to appeal or the issuance of a certificate of appealability. However, in an appeal brought by the United States or a state from an order granting the relief requested, a petitioner shall be entitled to representation as a matter of right.

In any non-capital case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, the court may, on motion of the petitioner or on its own motion, appoint counsel where the court determines that (a) petitioner is financially unable to obtain adequate representation and (b) the interests of justice require legal representation, as when petitioner needs the assistance of counsel to go forward with an apparently meritorious petition. The clerk shall thereupon appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

Where a petitioner is under sentence of death, the clerk shall appoint counsel upon receipt of the notice of appeal.

II. APPOINTMENT OF COUNSEL

1. Court Order: Every appointment of counsel pursuant to the Criminal Justice Act and this Plan shall be made by an order of this court. A prerequisite to appointment shall be an affirmative finding by the court that a defendant is financially unable to employ counsel. However, where counsel was appointed in the lower court, this court will presume, until reason to the contrary appears, that the defendant remains financially unable to retain counsel, and no such finding shall be required.

The selection of counsel under the Criminal Justice Act shall be the exclusive responsibility of the court, and no person entitled to court-appointed counsel shall be permitted to select counsel to represent him.

2. Retroactivity: An appointment may be made retroactive to include any representation furnished to an indigent by an attorney prior to appointment pursuant to this Plan.

Repealed February 27, 2018

3. Scope: A person for whom counsel is appointed shall be represented at every stage of the proceedings, through appeal, including ancillary matters appropriate to the proceedings and including a petition for writ of certiorari to the Supreme Court if non-frivolous grounds exist for filing such a petition.

4. Substitution of Counsel: The court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings. The total compensation to be paid both attorneys shall not exceed the statutory maximum for one appointment, unless the case involves extended or complex representation.

5. One Attorney for Multiple Defendants: In appeals involving multiple defendants, separate counsel will normally be appointed for each defendant, unless there has been a waiver on the record by the defendants or good cause is shown. If one attorney is appointed to represent more than one defendant, a separate order of appointment shall be entered for each defendant. The attorney may be compensated for his services up to the maximum for each defendant represented; however, time spent in common on one or more defendants must be prorated.

6. Multiple Appointments for One Defendant: In capital cases, and in other cases of extreme difficulty where the interests of justice so require, the court may appoint an additional attorney to represent a defendant. Each attorney so appointed shall be eligible to receive the maximum compensation allowed under the Criminal Justice Act. Any defendant indicted for a capital offense is entitled to have two attorneys appointed. 18 U.S.C. § 3005.

7. Defendant's Objection to Appointed Attorney: The court shall give consideration to a defendant's expression of dissatisfaction with his counsel only if specific grounds for dissatisfaction are stated. Appointed counsel shall be relieved only when the court, in its discretion, determines that the interests of justice so require.

8. Withdrawal of Counsel: An attorney appointed to represent a defendant in the lower court is generally obliged to continue that representation upon appeal unless relieved by this court. *See infra* Part V.1. An attorney who does not desire to continue the representation must file a motion to withdraw with the clerk of this court promptly after filing the notice of appeal.

Counsel's request to be relieved from representation on appeal shall be given due consideration. While the court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel. Substitution of counsel shall not reflect negatively in any way on the conduct of the lawyer involved.

In its discretion, this court may appoint the attorney who represented the eligible person in the district court, a Federal Public Defender's office from the circuit, or a lawyer from the court's Criminal Justice Act panel. *See infra* Part IV.4.

Repealed February 27, 2018

III. DEFENDANT'S FINANCIAL STATUS

1. Filing Application: A defendant who, in the district court, was represented by employed counsel, or was unrepresented, or was represented by appointed counsel but has nonetheless been requested to file a new application in this court, may apply to this court for the appointment of counsel. Such application shall be accompanied by an affidavit disclosing the applicant's financial status and any resources available to him to compensate counsel.

2. Re-examination by Court: The court, at any time, may re-examine a defendant's financial status as it bears upon the appointment of counsel and, thereupon, (a) appoint counsel to represent the defendant, if the defendant is not already represented or is unable to pay previously retained counsel, (b) terminate the appointment of counsel, or (c) require a partial payment of counsel fees by the defendant. The defendant shall furnish such financial and related information as may be requested during the re-examination, unless he desires to proceed without counsel.

3. Insufficiency of Funds; Partial Payment: If a defendant's net financial resources and anticipated income are in excess of the amount needed to provide him and his dependents with the necessities of life and to provide for his release on bond, but are insufficient to pay fully for retained counsel, this court will find the defendant eligible for the appointment of counsel but will direct him to pay the available excess funds to the clerk at the time of appointment. The court may increase or decrease the amount of such payments and impose appropriate conditions, where applicable. All such payments by the defendant shall be received pursuant to the prescriptions of subsection (f) of the Criminal Justice Act.

4. Family Resources: Funds and property standing in the name of, or held by, members of a defendant's family will be considered available for the payment of the fees of retained counsel if there is a finding, upon a reasonable basis of fact, that the family has indicated a willingness and a financial ability to pay all or part of the costs of representation. The initial determination of a defendant's eligibility for the appointment of counsel should be made without regard to family resources unless the family plans and is financially able to retain counsel promptly.

5. Attorney's Information: If at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal services in connection with his representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall so advise this court.

IV. PANEL OF ATTORNEYS

1. CJA Appellate Panel Committee: A CJA appellate panel committee will be appointed by the court for the purpose of recommending minimum standards of eligibility for the

Repealed February 27, 2018

CJA appellate panel, developing legal education and training opportunities for panel members, and otherwise improving CJA appellate representation.

2. Panel Composition: The clerk, subject to this court's approval, shall prepare a list of attorneys from which appointments shall be made. Attorneys, to be eligible for appointment, must be admitted to practice before this court under Rule 46 of the Federal Rules of Appellate Procedure, and must meet the minimum standards of eligibility recommended by the CJA appellate panel committee and adopted by the court. In preparing a list, the clerk will review and consider the standards of eligibility adopted by the court and the court's experience with attorneys.

3. Periodic Revision: The panel shall be revised periodically to ensure an adequate number of competent attorneys to provide effective representation to all persons entitled to appointed counsel.

4. Appointments: Appointments shall be made by the clerk on a rotational basis, subject to this court's discretion. Consideration will be given to the nature of the case, the place of the trial, the residence of the indigent person if on bail, the place of confinement, and other relevant matters. In death penalty cases at least one attorney appointed must have been admitted to practice in the Fourth Circuit Court of Appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in the Fourth Circuit in felony cases. For good cause however, the court may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the petitioner, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. The Court will look to the factors articulated in the American Bar Association's guidelines for selection of appellate counsel in capital cases including the length of bar membership, general experience in criminal defense litigation, and specific experience in death penalty appeals and appeals of murder, aggravated murder or other serious felonies. The Court will also consider whether counsel has attended and successfully completed a recent training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed. Finally, the Court will review the availability of ongoing consultation support to appointed counsel from experienced counsel.

When the court determines that the appointment of an attorney, who is not a member of the CJA panel, is appropriate in the interest of justice, judicial economy, or some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA panel pro hac vice and appointed to represent the appellant. These appointments should be made only in exceptional circumstances, such as the appointment in a death penalty case of an attorney furnished by a state or local public defender organization or legal aid agency where the attorney had represented the appellant during prior state court proceedings. Further, the attorney should possess such qualities as would qualify him or her for admission to the CJA panel in the ordinary course of panel selection.

5. Removal from the Panel: An attorney may be removed from the panel by the clerk for twice refusing to accept an appointment or by the court for any good reason.

V. ATTORNEY'S DUTY TO CONTINUE REPRESENTATION

1. Trial Counsel: Every attorney, including retained counsel, who represented a defendant in the district court shall continue to represent the client after termination of those proceedings, unless relieved of further responsibility by this court. Where counsel has not been relieved:

If there is a judgment of conviction or an order revoking probation, counsel shall inform the defendant of his right to appeal and of his right to have counsel appointed on appeal. If so requested by the defendant, counsel shall file a timely notice of appeal. Thereafter, unless the defendant otherwise so instructs, counsel shall take appropriate and timely steps to perfect and present the appeal, including, where appropriate, the ordering of such part of the transcript as may be necessary for consideration on appeal.

Similarly, if there is an appeal by the United States from an order or judgment adverse to it, counsel shall continue to represent the client.

In any case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by the district court denying the relief requested, counsel shall inform the petitioner of his right to appeal and of the court's authority to appoint appellate counsel in its discretion. If so requested by the petitioner, counsel shall file a timely notice of appeal and a motion for appointment of appellate counsel, and counsel's duty is thereby ended. On the other hand, if petitioner is granted the relief requested, counsel shall continue to represent the petitioner in the event the respondent appeals the judgment.

2. Appellate Counsel: Every attorney, including retained counsel, who represents a defendant in this court shall continue to represent his client after termination of the appeal unless relieved of further responsibility by this court or the Supreme Court. Where counsel has not been relieved:

If the judgment of this court is adverse to the defendant, counsel shall inform the defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so requests and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall prepare and file a timely petition for such a writ and transmit a copy to the defendant. Thereafter, unless otherwise instructed by the Supreme Court or its clerk, or unless any applicable rule, order or plan of the Supreme Court shall otherwise provide, counsel shall take whatever further steps are necessary to protect the rights of the defendant, until the petition is granted or denied.

If the appellant requests that a petition for writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with this court wherein counsel requests to be relieved of the responsibility of filing a petition for writ of certiorari. The motion must reflect that a copy was served on the client.

If the United States seeks a writ of certiorari to review a judgment of this court, counsel shall take all necessary steps to oppose the United States' petition.

Similarly, in any proceeding brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by this court, appointed counsel shall take those steps necessary, as set forth above, to protect the rights of the defendant in the Supreme Court.

VI. COMPENSATION AND REIMBURSEMENT OF EXPENSES

1. Voucher: Upon the completion of service in this court, appointed counsel shall submit a voucher for compensation and reimbursement on the Criminal Justice Act form currently approved by the Administrative Office of the United States Courts. Vouchers shall be submitted no later than 60 days after the final disposition of the case, unless good cause is shown. The clerk will determine the amount of compensation and reimbursement to be paid. The approved voucher will then be reviewed by the Circuit Executive, signed by the Chief Judge, and forwarded to the Administrative Office for payment or further handling.

2. Hourly Rates: ~~For work done on or after May 20, 2007, counsel may be compensated at rates not exceeding \$94 per hour for in court time and \$94 per hour for out of court time unless the Judicial Conference determines that a higher rate is justified. In death penalty cases these maximum rates do not apply. Counsel in these cases may be compensated at such rates as the Court determines to be reasonably necessary, up to \$166 per hour for work performed on or after May 20, 2007. Time spent awaiting oral argument is considered to be time expended out of court.~~ **Counsel may be compensated at rates authorized by the Judicial Conference pursuant to 18 U.S.C. § 3006A(d)(1) for non-capital cases and pursuant to 18 U.S.C. § 3599(g)(1) for capital cases.**

3. Maximum Compensation Allowable: ~~Effective December 8, 2004, in any direct appeal from a criminal conviction, any appeal in a habeas corpus proceeding, any appeal from a determination of the United States Parole Commission under 18 U.S.C. § 4106A, and any appeal in a civil forfeiture proceeding in which counsel is appointed pursuant to 18 U.S.C. § 983, except in death penalty cases, the total compensation, exclusive of expenses, shall not exceed \$5,000 for an attorney's services rendered in this court. In death penalty cases, compensation is in such amounts as the court determines to be reasonably necessary.~~

~~Effective December 8, 2004, in any other proceeding in which representation is required or authorized by the Criminal Justice Act, including bail appeals and appeals from probation or supervised release revocation proceedings, the total compensation, exclusive of expenses, shall not exceed \$1,500 for an attorney's services rendered in this court.~~ **Limitations on maximum compensation shall be as prescribed in 18 U.S.C. § 3006A(d)(2) for non-capital cases. In capital cases, maximum compensation limits do not apply, and compensation shall be in such amounts as the court determines to be reasonably necessary.**

In all cases where there has been a substitution of counsel, or where multiple defendants have been represented by one attorney or multiple appointments have been made for one defendant, total compensation shall be determined pursuant to Section II, Paragraphs 4, 5, and 6.

Payment in excess of the prescribed limitations may be made to provide fair compensation in a case involving extended or complex representation, upon approval by the Chief Judge of this court or other active circuit judge designated by him. Counsel claiming in excess of the statutory maximum must submit with his voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in a complex or

Repealed February 27, 2018

extended case, and that the excess payment is necessary to provide fair compensation. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex." If more time is reasonably required for total processing than would normally be required in the average case, the case is "extended." Attorneys seeking compensation have the burden of providing sufficient details to support their claim that the case is more complex or time consuming than the average case. This burden also exists with regard to the reasonableness of hours claimed for representation.

4. Reimbursable Expenses: Counsel shall be entitled to reimbursement for reasonably incurred out-of-pocket expenditures. Travel by privately owned automobile should be claimed at the mileage rate currently applicable to federal employee travel, plus parking fees and tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Necessary airline travel will be reimbursed only at coach class rates. Expenditures for meals and lodging, as well as for telephone toll calls, telegrams, and copying are reimbursable. The cost of photocopying or similar copying services is reimbursable, while the cost of printing is not. Where photocopying services are performed in counsel's office, the reimbursement shall be limited to out-of-pocket expenses, not to exceed 15 cents per copy. For photocopying and other services in preparation of briefs and appendices by commercial printers, reimbursement shall not exceed 35 cents per copy. All materials contained in appendices prepared by commercial printers in court-appointed cases will be reproduced on both sides of a sheet. No joint appendix in a court-appointed case shall exceed 250 sheets without advance permission from the Court. Compensation paid to law students for legal research is reimbursable, but expenses incurred by the law student in assisting counsel are not. When necessary for adequate representation in death penalty cases, reasonable employment and compensation of public and private organizations which provide consulting services to counsel are reimbursable to assist in such areas as records completion, identification of potential issues, exhaustion of state remedies, and review of draft pleadings and briefs. Detailed receipts are required for all travel and lodging expenses, non-office copying services, and any other expense in excess of \$50.00. Failure to provide detailed receipts may result in the expense being denied. Any expense in excess of \$50.00 must be itemized in a manner which will permit a review of the amount expended.

5. Representation to the Supreme Court: Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari to the Supreme Court, and in the protection of the defendant's rights up until the time that Court disposes of a petition, should be included in the voucher for services performed in this court.

6. Number of Copies: Appointed counsel is required to file six copies of the brief and five copies of the appendix with the clerk of the court, with service of one copy on counsel for each party separately represented. Appointed counsel shall be entitled to reimbursement for the cost of photocopying required copies.

7. Non-reimbursable Expenses: General office overhead, personal items and

Repealed February 27, 2018

non-legal personal services for the person represented, filing fees, services of process, and printing are non-reimbursable. (A person represented under the Criminal Justice Act is not required to pay filing fees or costs, or give security therefor, nor must he file the 28 U.S.C. § 1915(a) affidavit, for an appeal.)

8. Authorized Transcripts: Authorized transcripts should not be claimed in the voucher by an attorney. The Administrative Office will pay the appropriate court reporter directly.

9. Interim Payment of Expenses: This court, in rare cases, will entertain requests for interim reimbursement of extraordinary and substantial expenses.

10. Direct Payment from Person Represented: No appointed counsel shall accept a payment or a promise of payment from a defendant for representation in this court without prior authorization from the court on an appropriate Criminal Justice Act form.

11. Public Defender: Where a defendant is represented by a federal public defender, the defender shall be compensated solely by his federal salary and shall not submit a Criminal Justice Act form for compensation.

12. Non-appointed Co-Counsel: Non-appointed attorneys may not be compensated, but an appointed attorney may claim compensation for services furnished by a partner, associate, or co-counsel, within the maximum compensation allowed to the appointed attorney.

VII. RULES, REGULATIONS, FORMS

1. Rules and Regulations: This Plan shall be subject to and held to have been amended pro tanto by any rule or regulation adopted by the Judicial Conference of the United States concerning the operation of plans under the Criminal Justice Act.

The Judicial Council or this court may adopt rules or regulations concerning the operation of this Plan, which, when promulgated, shall have the same force as provisions of this Plan.

2. Forms: Forms approved by the Administrative Office of the United States Courts for use in the administration of the Criminal Justice Act shall be used whenever appropriate. Where there are no approved forms, this court may approve and require the use of designated forms or other instruments.

VIII. ADMINISTRATION

Generally; Clerk's Office: Any act to be done by the court may be done by any

Repealed February 27, 2018

judge of the court, by the clerk, or by a deputy clerk pursuant to delegated authority.

IX. DEFINITIONS

1. Supreme Court: Supreme Court of the United States.
2. Administrative Office: Administrative Office of the United States Courts.
3. This court; the court: the United States Court of Appeals for the Fourth Circuit.
4. Criminal Justice Act: Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as amended.
5. Defendant; Defendants: Where appropriate in this Plan, the word "defendant" or "defendants" shall be construed to include petitioner or petitioners in a collateral proceeding.
6. Judicial Council: Judicial Council of the Fourth Judicial Circuit of the United States.

X. AMENDMENTS

This Plan may be amended at any time by the Judicial Council effective when a copy of the amendatory resolution is filed with the Administrative Office or at such later date as may be specified in the resolution.

XI. EFFECTIVE DATE

This amended plan is effective September 17, 2007 [REDACTED].